NINA F. LOCKER, State Bar No. 123838
nlocker@wsgr.com
STEVEN GUGGENHEIM, State Bar No. 201386
sguggenheim@wsgr.com
JONI OSTLER, State Bar No. 230009
jostler@wsgr.com
JESSICA L. SNORGRASS, State Bar No. 259962
jsnorgrass@wsgr.com
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
650 Page Mill Road
Palo Alto, CA 94304-1050
Telephone: (650) 493-9300
Facsimile: (650) 565-5100

Attorneys for Defendants
Juniper Networks, Inc., Kevin R. Johnson,
Robyn M. Denholm, and Scott G. Kriens

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CITY OF OMAHA POLICE AND FIRE RETIREMENT SYSTEM and CITY OF BRISTOL PENSION FUND, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, v. JUNIPER NETWORKS, INC., SCOTT G. KRIENS, KEVIN R. JOHNSON, and ROBYN M. DENHOLM, Defendants.	CASE NO.: 11-cv-4003 LHK CLASS ACTION **DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS SECOND AMENDED COMPLAINT FOR VIOLATION OF THE FEDERAL SECURITIES LAWS** Date: January 31, 2013 Time: 1:30 p.m. Dept: 8, 4th Floor Before: Honorable Lucy H. Koh

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 31, 2013, or as soon thereafter as the matter may be heard, before the Honorable Lucy H. Koh of the United States District Court for the Northern District of California, San Jose Courthouse, Courtroom 8, 4th Floor, 280 South 1st Street, San Jose, CA 95113, Juniper Networks, Inc. ("Juniper"), Kevin R. Johnson, Robyn M. Denholm and Scott G. Kriens (the "Individual Defendants") will, and hereby do, move to dismiss the Second Amended Complaint for Violations of the Securities Laws pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure. This motion is based on the Notice of Motion and Motion, the Memorandum of Points and Authorities below, the accompanying Request for Judicial Notice, the declaration of Joni Ostler ("Ostler Decl.") and attached exhibits, the [Proposed] Order, the arguments of counsel, and any other matters properly before the Court.

STATEMENT OF ISSUES (Civil L.R. 7-4(a)(3))

1. Have Plaintiffs pled specific, particularized facts that any defendant made a false statement sufficient to state a claim for primary liability under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5?

2. Have Plaintiffs pled sufficient particularized facts showing a strong inference of scienter sufficient to state a claim for primary liability under Section 10(b) of the Exchange Act and Rule 10b-5?

3. Should Plaintiffs' claims under Section 20(a) and Section 20A of the Exchange Act be dismissed for failure to adequately allege a primary violation?

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiffs allege that the Defendants defrauded Juniper investors by issuing false long term revenue projections and by failing to make sufficient disclosures regarding a change in accounting rules. The Court dismissed Plaintiffs' prior complaint because it failed the pleading requirements for a securities fraud claim in almost every respect. The Court held that the challenged projections were protected by the Safe Harbor of the Private Securities Litigation

Reform Act ("PSLRA") and therefore not actionable. The Court also held that, Safe Harbor aside, Plaintiffs failed to adequately allege that the projections were false when made or that any Individual Defendant had the required actual knowledge of falsity. With respect to Juniper's disclosures regarding the impact of the new accounting rules, the Court found that Plaintiffs failed to allege those disclosures were false or misleading or that Juniper had a legal duty to disclose more details than it did. Finally, the Court held that Plaintiffs' allegations regarding the Individual Defendants' corporate positions and motive and opportunity to commit fraud were insufficient to give rise to the required strong inference of scienter.

Apart from changes in some verbiage, Plaintiffs' Second Amended Complaint ("SAC") differs from the Amended Complaint ("AC") in only two substantive respects. First, with respect to the long term revenue projections, Plaintiffs have added a total of three new paragraphs to the SAC. These paragraphs purport to describe what a new confidential witness, CW6, supposedly told Plaintiffs. However, the Court need not analyze these new allegations because Plaintiffs make no effort to explain why the Safe Harbor, which the Court previously held was applicable to the projections, does not, in fact, apply. As a result, Plaintiffs' false forecasting claim may be dismissed again on that basis alone. Beyond this, CW6's vague references to purported product issues and slumping sales are no different than the vague allegations from Plaintiffs' other confidential witnesses that this Court held were insufficient to plead falsity. Like the other witnesses, CW6 does not explain how the problems and difficulties he references would necessarily prevent Juniper from achieving its long term revenue guidance. Indeed, the most telling thing about CW6 is what he does *not* say. CW6 purportedly had access to Juniper's financial forecasting system, yet never asserts that Juniper's internal revenue forecasts were in any way inconsistent with the long term revenue projections that Juniper gave the public. Plaintiffs' forecasting claim should be dismissed.

Second, with respect to the accounting disclosure claim, the SAC simply alleges new *arguments* about the purported need for further disclosure. However, in its prior order, the Court dismissed the accounting disclosure claim because Plaintiffs failed to allege *facts* showing that Juniper's disclosures were materially misleading under the federal securities laws. The SAC

contains no new facts about the Company's disclosures regarding the new accounting rules. The crux of Plaintiffs' new arguments remains the same: that additional details would have been helpful to investors. Yet as this Court held, there is no duty of "completeness" under the federal securities laws. Plaintiffs' new arguments fail to suggest, as they must, that what Juniper disclosed was false or misleading or that Juniper violated any duty to make further disclosures. In fact, much of what Plaintiffs now argue should have been disclosed by Juniper *was* disclosed, and in some instances, repeatedly.

Plaintiffs also fail to allege any new facts that would show scienter. Plaintiffs' new confidential witness does not claim he ever met or spoke to any Individual Defendant, much less that he was aware of what any defendant purportedly knew about the Company's accounting disclosures or long term revenue projections. Plaintiffs' further addition of a sentence to the effect that all "insiders" sold more stock in Q1 2011 than previously, fails to salvage their claim. To the extent this sentence purports to refer to sales by non-defendants, it is legally irrelevant. To the extent this new sentence about stock sales refers to sales by the Individual Defendants, the Court already considered and rejected Plaintiffs' argument that these stock sales, including those made in Q1 2011, created the requisite strong inference of scienter.

Plaintiffs have made essentially trivial amendments to their complaint. Those amendments fail to cure the defects this Court identified in its Order granting Defendants' prior motion to dismiss. Defendants respectfully submit that the SAC should be dismissed, with prejudice.

BACKGROUND

The Parties. Juniper is a Delaware corporation headquartered in Sunnyvale, California. *See* ¶ 25.[1] Juniper designs and sells communications networking and security equipment and

[1] References to "¶ __" are to paragraphs of the SAC filed on August 20, 2012 (Docket # 87) unless otherwise noted. References to "Harden ¶ _" are to the Declaration of Stuart H. Harden in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss Amended Complaint, which is now filed as Exhibit A to the SAC. Exhibits ("Ex. _") are attached to the Declaration of Joni Ostler, filed herewith. References to "Order at _" are to the Court's July 23, 2012 Order Granting Defendants' Motion to Dismiss (Docket # 84).

software. ¶¶ 3, 25. Juniper had over 9,000 full-time employees at the end of the Class Period (Ex. 13 at 7) and its revenues for fiscal year 2010 were $4.093 billion. Ex. 6 at 3. Juniper's revenues exceeded $1 billion during each quarter of the Class Period. ¶¶ 95, 111, 140, 160.

Defendant Kevin R. Johnson has been Juniper's Chief Executive Officer, President, and a director since August 2008. ¶ 27. Defendant Robyn M. Denholm has been Juniper's Chief Financial Officer since August 2007. ¶ 28. Defendant Scott G. Kriens served as Juniper's CEO from 1996 to 2008. ¶ 26. He stepped down as CEO in August 2008 but remained an employee of Juniper until April 1, 2011. *Id.* Mr. Kriens has served continuously as Chairman of Juniper's Board of Directors since 1996. *Id.*

The Claims. Plaintiffs' SAC challenges as false or misleading the same statements Plaintiffs challenged in the AC, namely: (1) Juniper's disclosures surrounding its adoption of the new Financial Accounting Standards Board ("FASB") accounting rules for revenue recognition and (2) Juniper's long term projections of 20% or higher year over year revenue growth.

FASB's Change in Accounting Rules. In its Order Granting Defendant's Motion to Dismiss, the Court described the new revenue recognition rules adopted by the FASB in 2009. The new rules addressed the recognition of revenue in the sale of multiple-deliverable arrangements (*e.g.,* equipment plus software and services) and the sale of products that include software. *See* Order at 7; Exs. 14-15. The purpose of the new rules was to more accurately reflect economic reality. *Id.* Under the old rules, unless Juniper could establish "fair value" for every element of the multi-deliverable arrangement, then *all* revenue for the entire transaction had to be deferred until delivery of every element for which Juniper could not establish "fair value." *See* Order at 7. For example, if Juniper sold a piece of hardware that included operating system software on it, but promised that the next version of the software would have a specific feature the customer wanted (a "future feature"), Juniper would have to defer *all* revenues from the transaction until it delivered the future feature since it was impossible to establish fair value for the future feature under the old rules. *Id.* at 6-7.

The new accounting rules gave companies additional methods to establish fair value and required them to establish fair value for each element of multiple-element arrangements.

Companies determine the value of each element of the arrangement at the outset and then recognize the revenue allocated to the elements as they are delivered. Ex. 3 at 7. Thus, in the scenario described above, under the new accounting rules, Juniper would allocate the selling price among the various elements in the arrangement based on the new, less restrictive fair value methods and defer only that portion of the revenue attributable to the future feature.

The new accounting rules became mandatory for Juniper in its fiscal year 2011, but FASB allowed companies to adopt the new rules early. Order at 8.

Juniper's Disclosures Regarding the Change in Accounting Rules. Juniper adopted the new rules in Q1 2010. *Id.* In its Q1 2010 earnings release, Juniper disclosed that it had adopted the new accounting rules for all transactions entered into after December 31, 2009. Juniper also disclosed that as a result of the change in accounting rules, Juniper's Q1 revenue included an additional $25 million that would have been deferred under the old rules. Ex. 2. Juniper's CFO, Ms. Denholm, repeated this information in her prepared remarks during the Q1 earnings call with analysts. Ex. 9 at 4. On the call, Ms. Denholm also answered analysts' questions regarding the impact of the new rules. *Id.* at 7-9, 12. *See also* Ex. 10 at 11-12, 18-19; Ex. 11 at 9; Ex. 12 at 12-13.

Two weeks later, Juniper discussed the new accounting rules in its Q1 2010 Form 10-Q. Juniper discussed the new rules in three different places – in Management's Discussion and Analysis, in the financial statements, and in the risk factors. Ex. 3 at 7-8, 36-37, 62. The Form 10-Q contained additional details in terms of describing the new rules, explaining how they differed from the old rules and explaining how the new rules would impact both Juniper's reported revenues and deferred revenues. *Id.* As the Court noted in its Order, while Plaintiffs purport to challenge the adequacy of Juniper's disclosures, they cannot dispute that these disclosures were made. *See* Order at 8-9 ("While Plaintiffs' assert that Defendants' disclosures were inadequate, they acknowledge that Defendants did, at various times, disclose their adoption of the new accounting rules.").

The FASB Requirements. As the Court also noted, during the year in which companies transitioned to the new rules, FASB recognized that early recognition of revenue under the new

rules "would create what appeared to be a revenue boost, which could have a significant impact on year-to-year comparison of financial statements . . . ." Order at 7. Accordingly, "FASB required companies in the transition period to disclose 'information that enables users of [their] financial statements to understand the effect of adopting the [new rules].'" *Id.*

In particular, the new rules required certain qualitative and quantitative disclosures in the year of adoption (2010). Order at 7-8. The qualitative disclosures required a description of the change in: (1) the units of accounting (*i.e.*, what were the separate parts of the multiple-element deals that Juniper sold among which Juniper was required to allocate the sales price); (2) how Juniper allocated the sales price to each of those units of accounting; and (3) the pattern and timing of revenue recognition. *Id.* at 7. Also, if the new rules were expected to have a material effect on financial statements in periods after the initial adoption (*i.e.*, after Q1 2010), the rules required disclosure of "quantitative information to satisfy the objective of describing the effect of the change in accounting principle." *Id.* The rule gave three "examples of methods (but not the only potential methods) that may individually or in combination provide quantitative information to satisfy that objective." *Id.* at 7-8. Example 1 of the three examples was to disclose the amount of revenue that would have been recognized under the old rule vs. the new rule. *Id.* at 7.

In response to the qualitative disclosure requirements, Juniper disclosed (1) how it determined its units of accounting (by evaluating each separate deliverable in a multiple-element arrangement to determine if it has stand-alone value), and that the new rules did not generally change those units of accounting; (2) how it allocated the sales price to each unit of accounting (based on relative selling price); and (3) that for the category of sales treated differently by the new rules, Juniper would be recognizing more revenue up front than it had under the old rules, and as a result it expected deferred revenues on these sales to gradually decrease over time, but that it could not reasonably estimate the effect of the rules on future periods because the impact would depend on whether Juniper entered into the type of sales that were treated differently under the new rules, and the volume of such sales. *See* Order at 9; Ex. 3 at 6-8, 37, 62; Ex. 4 at 7-8, 44-45; Ex. 5 at 6-7, 41-42, 66; Ex. 6 at 32-33, 64-65.

In response to the quantitative disclosure requirements, Juniper satisfied Example 1 by reporting, each quarter in the year of adoption (2010), the amount of revenue recognized under the new rule that would have been deferred under the old rule (the "pick-up" revenue). *See* Ex. 3 at 6-8, 37, 62; Ex. 4 at 7-8, 44-45; Ex. 5 at 6-7, 41-42, 66; Ex. 6 at 32-33, 64-65. Juniper also reported the amount of the pick-up revenue attributable to particular types of transactions.[2] Juniper disclosed information regarding the new rules in several places in each quarterly SEC filing. Ex. 3 at 7-8, 36-37, 62; Ex. 4 at 6-8, 21, 44-45, 59, 70; Ex. 5 at 6-8, 20, 40-42, 66; Ex. 6 at 32-33, 64-66, 80.

Disclosure Beyond the FASB Requirements. Juniper disclosed information beyond the FASB requirements. Juniper not only reported the amount of revenue recognized under the new rules that would have been deferred under the old rule, but also described how much of that pick-up revenue would have been deferred under different provisions of the old rules. *See* Ex. 4 at 7, 21, 45, 59; Ex. 5 at 6, 20, 41, 57; Ex. 6 at 32-33. Each quarter during the Class Period, Juniper also gave a breakdown of its deferred revenue balance to enable investors to see how much revenue was deferred for undelivered product commitments or other product deferrals as opposed to revenue deferred because it was still in the distributor channel. Ex. 4 at 21, 59; Ex. 5 at 20, 57; Ex. 6 at 49, 80; Ex. 7 at 41; Ex. 8 at 42. Juniper also told investors how much of its deferred revenue balances would be recognized in the next twelve months – "short term" or "current" deferred – and how much would be recognized later than the next twelve months – "long term" deferred. ¶ 136; Ex. 4 at 21, 59; Ex. 5 at 20, 57; Ex. 6 at 49, 80; Ex. 7 at 41; Ex. 8 at 42.

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[2] In Q1 2010, Juniper explained that the entire pick-up amount from that quarter resulted from one sale that included undelivered elements for which, under the old rules, Juniper would not have been able to demonstrate fair value (and thus revenue for the entire sale would have been deferred). Ex. 3 at 6. In Q2, Q3 and Q4 2010, Juniper reported (a) the amount of the pick-up that was due to sales that included undelivered product commitments ("future features"), which under the old rules would have required deferral of *all* of the revenue from the sales, and (b) the amount of the pick-up that was attributable to sales that included products plus multiple-year service arrangements (which under the old rules would have been recognized ratably over the term of the service arrangement). Ex. 4 at 7, 45; Ex. 5 at 6, 41; Ex. 6 at 33.

Further, from Q2 2010 forward, Juniper added additional details to its disclosures regarding the composition of its deferred revenue: Juniper separately reported the amount of deferred revenue for undelivered product commitments (*e.g.*, future software features) and other product sales, the amount of deferred revenue for sales to distributors, and the amount of deferred revenue for services. Ex. 4 at 21, 59; Ex. 5 at 20, 57; Ex. 6 at 49, 80.

Juniper's independent auditors gave an unqualified opinion that Juniper's financial statements complied with GAAP. Ex. 6 at 55-56.

Juniper's Long Term Projections. Like the AC, the SAC continues to challenge Juniper's statements that it expected to achieve 20% or higher year over year revenue growth and operating margins of 25% over the next three to five years (the "long term projections"). ¶ 15. Plaintiffs allege that these projections were fraudulent and that the "truth" was revealed on July 26, 2011, the last day of the Class Period. ¶ 160. On July 26, Juniper announced that its revenues for Q2 2011 would be $10 million short of the low end of its revenue guidance of $1,130,000,000 - $1,190,000,000. *Id.* Notably, Juniper still "delivered 18% year-on-year growth through the first half" of 2011. Ex. 13 at 3. However, in Juniper's quarterly conference call with investors, it explained that business in Q2 2011 had been impacted by slower than expected recovery in the macroeconomic environment, lower than expected demand for SLT products and from Service Provider customers, and lower demand from Japan because of the tsunami. *Id.* at 5. Given these factors, the Company stated that it expected revenues for fiscal year 2011 to grow in the range of 12% to 14%, *i.e.*, less than the long term projections. *Id.* at 8. Following this disclosure, Juniper's stock price declined by 20.9%. ¶ 171.

The Court's Order Dismissing Plaintiffs' First Amended Complaint. As set forth in the Court's Order granting Defendants' motions to dismiss, in their Amended Complaint Plaintiffs alleged that Juniper's long term projections of 20+% year-over-year revenue growth and 25+% operating margins were false and misleading because Defendants failed to disclose various problems that would allegedly hamper long term growth. Order at 4-6. Specifically, Plaintiffs relied on allegations from five confidential witnesses who purportedly stated that Juniper had an insufficiently trained sales force, was experiencing slumping sales and pricing

pressure from competitors, and suffered software bugs and compatibility problems with its SRX products. *Id.* at 6. Plaintiffs also alleged that Juniper's disclosures regarding the impact of the new accounting rules were inadequate, and that Juniper should have disclosed numerous additional facts. *Id.* at 8-9.

The Court found that Juniper's long term projections were protected by the PSLRA Safe Harbor and were therefore not actionable. Order at 17-19. The Court found that the projections were identified as forward-looking statements and accompanied by meaningful cautionary statements. *Id.* at 18-19. Further, the Court found that even if the projections had not been identified as forward-looking statements and accompanied by meaningful cautionary statements (which they were), Plaintiffs had not adequately pled, as they must, that Defendants "had actual knowledge that their forward-looking projections were false or misleading when made." *Id.* at 19-20.[3]

The Court also found, apart from the Safe Harbor, that Plaintiffs failed to adequately plead that Juniper's long term projections were false or misleading when made. *Id.* at 21. The Court considered the allegations offered by each of the Plaintiffs' CWs and concluded that they failed to provide facts showing that the various alleged problems necessarily precluded Juniper from meeting its long term projections. *Id.* at 21-22.

The Court also rejected Plaintiff's challenge to Juniper's disclosures regarding the new accounting rules, stating:

> The Court agrees with Defendants that Plaintiffs have not pled sufficient facts to show that Defendants' disclosures were materially misleading statements under the federal securities laws. Plaintiffs concede that Juniper made various disclosures throughout the Class Period regarding its adoption of the new accounting rules and the impact of the new rules on Juniper's financial results, and that Juniper's disclosure conformed to Example 1 in the FASB's disclosure guidelines. Plaintiffs merely object to the specificity and comprehensiveness of Juniper's various disclosures, insisting that Defendants' disclosure under Example 1 was insufficient and that Defendants should have made a more fulsome disclosure as set forth in Example 3 of the FASB guidelines. But it is well established that the PSLRA does not impose a duty of completeness.

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[3] The Court also found that numerous challenged statements were "simply vague assertions of corporate optimism and therefore not actionable under the federal securities laws." Order at 21.

Id. at 24. The Court held that Plaintiffs had failed to allege "that Defendants had an affirmative duty to provide further disclosures beyond what was already included in Juniper's SEC filings" or that "that disclosure of the omitted information would have significantly altered the 'total mix' of information available to investors." *Id.* at 24-25. The Court also refused to consider the Declaration of Stuart H. Harden that Plaintiffs submitted in support of their opposition to the motion to dismiss. *Id.* at 15.

Finally, the Court found that Plaintiffs had failed to adequately allege scienter. *Id.* at 25-30. The Court rejected Plaintiffs' attempt to rely on the "core operations theory" to infer scienter (*id.* at 26-28), and found that the allegations regarding Defendants' stock sales did not support a strong inference of scienter. *Id.* at 28-29. The Court specifically noted that Mr. Johnson "made only one sale during the entire Class Period," and Ms. Denholm's sales were all made "pursuant to a Rule 10b5-1 trading plan, which Denholm created prior to the Class Period." *Id.* Thus, although Plaintiffs alleged that Mr. Kriens sold "an unusually large portion of his stock holdings," "an allegation that only one Defendant displayed unusual stock trades during the Class Period is insufficient to support a strong inference of scienter absent some corroborating evidence." *Id.* at 29.

The Second Amended Complaint. The SAC does not challenge any statements not previously challenged in the First Amended Complaint. The SAC does not allege any new purportedly undisclosed facts. The only two substantive changes from the First Amended Complaint are: (1) Plaintiffs add three paragraphs from a new CW who offers his opinion regarding Juniper's long term projections (¶¶ 48-50); and (2) Plaintiffs copy large portions of the declaration of their "expert" Stuart H. Harden into the complaint and attach his declaration as an exhibit. ¶¶ 181-93; Harden ¶¶ 6-20.

The remainder of the SAC essentially repeats, word for word, the allegations the Court has already rejected. For example, Plaintiffs repeat almost verbatim their allegations that Juniper's long term projections were false or misleading due to (a) weakening demand, (b) an inadequate sales force, (c) pricing pressures from competitors, and (d) compatibility problems in SRX products with Juniper's JUNOS software. ¶¶ 34, 72(b)-(d), 100(b)-(d), 124(b)-(d), 149(b)-

(d). Plaintiffs also repeat the same allegations from CWs 1-5 that the Court already found inadequate. *Id.* ¶¶ 35-47.

In other words, with respect to Plaintiffs' false forecasting claim, the only new allegations are three paragraphs attributed to CW6. The only new allegations regarding the accounting disclosure claim are not facts, but rather Mr. Harden's arguments as to why Juniper's disclosures are purportedly inadequate. With respect to scienter, apart from a new sentence about stock sales, Plaintiffs have added nothing to the SAC. There are no new factual allegations whatsoever regarding any Individual Defendant's state of mind.

ARGUMENT

I. PLAINTIFFS' COMPLAINT IS SUBJECT TO STRICT PLEADING STANDARDS

As this Court explained, Plaintiffs' complaint is subject to the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure and the PSLRA, which imposes "formidable pleading requirements to properly state a claim." Order at 11, quoting *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1055 (9th Cir. 2008). Plaintiffs must allege both falsity and scienter with particularity. Order at 11. To plead falsity, Plaintiffs must allege specific facts indicating why the challenged statements were false or misleading when made. *Metzler*, 540 F.3d at 1070. To plead scienter, Plaintiffs must allege, with particularity, facts giving rise to an inference of scienter that is "'cogent and at least as compelling as any opposing inference of nonfraudulent intent.'" Order at 12, quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007). As discussed below, the SAC – which is virtually unaltered from the complaint previously dismissed by this Court – fails to meet these standards and should again be dismissed, this time with prejudice.

II. PLAINTIFFS STILL FAIL TO ALLEGE AN ACTIONABLE FALSE OR MISLEADING STATEMENT

A. Plaintiffs' Claim Based Upon Juniper's Long Term Projections Must Be Dismissed

The Court previously ruled that all of the "long-term revenue projections are either: (1) protected by the PSLRA Safe Harbor; (2) mere expressions of corporate optimism and thus not actionable; or (3) not adequately plead as false or misleading." Order at 17. Despite this ruling, Plaintiffs continue to allege, in a verbatim recitation, that Juniper's long term projections were false when made due to various purported challenges such as bugs in its SRX security products and slumping demand. *Compare* ¶ 30 *with* AC ¶ 26; *compare* ¶ 34 *with* AC ¶ 30; *compare* ¶ 46 *with* AC ¶ 42; *compare* ¶ 72 *with* AC ¶ 74; *compare* ¶ 100 *with* AC ¶ 96; *compare* ¶ 149 *with* AC ¶ 135. Since Plaintiffs have added nothing to allegations that the Court previously deemed insufficient, these allegations can be rejected.

The Court's Order also noted that Juniper's long term projections were "prototypical examples of forward-looking statements" that were both identified as such and accompanied by meaningful cautionary statements about the various factors that could prevent Juniper from achieving its long term projections. Order at 18-19. Plaintiffs allege no additional facts that could change this conclusion. The fact that Juniper's long term projections are protected by the Safe Harbor is an additional basis for dismissal.[4]

Of course, even if the long term projections were not protected by the Safe Harbor (which they are), Plaintiffs still fail to adequately allege that the projections were false when made.

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[4] Plaintiffs allege that "most" of the challenged statements – apparently other than the projections that this Court has held are forward looking (Order at 17-19) – are not protected by the Safe Harbor because they "related to existing facts or conditions, *i.e.*, that Juniper remained 'on track' to achieve its long term financial growth." ¶ 177. As the Court already held, however, statements "in which Defendants merely express confidence in Juniper's business and outlook" are not actionable because they are merely "vague assertions of corporate optimism." Order at 20-21; *see also In re Foundry Networks, Inc. Sec. Litig.*, No. C 00-4823, 2003 WL 22077729, at *15 (N.D. Cal. Aug. 29, 2003) ("Plaintiffs cite to no case, and the Court is aware of none, wherein it has been held that a general statement such as 'business remains on track' is sufficient to support a § 10(b) claim."). Additionally, Plaintiffs make no effort to allege these other statements were false.

Plaintiffs' allegations from CW1 – CW5, rejected as inadequate by this Court, are unchanged. *Compare* ¶¶ 35-47 *with* AC ¶¶ 31-43; Order at 21-23. The *only* new allegations are those relating to a purportedly new confidential witness, CW6. ¶¶ 48-50. Thus, even if Plaintiffs had alleged a basis for overcoming the Safe Harbor, their forecasting claim cannot survive unless the three paragraphs Plaintiffs have added regarding CW6 adequately allege that Juniper's long term revenue projections were false when made.

In that regard, CW6 purports to "confirm" that Juniper's long term goal of 20% year over year revenue growth was "not a realistic objective." ¶ 48. CW6 also alleges that Juniper's business was "adversely affected" by various problems. ¶ 49. But CW6 fails to explain how he would have knowledge of these things, and in any event, his allegations are too vague to credit.

At the outset, CW6 does not even claim he had any role, much less a senior role, in Juniper's revenue forecasting. Rather, Plaintiffs allege that CW6 was responsible for managing Juniper's expenses, and more particularly its annual operating expenditures. ¶ 48. Plaintiffs thus do not allege a basis upon which to credit CW6's opinion regarding Juniper's revenue projections. *See Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 995 (9th Cir. 2009) (Plaintiffs must "provide an adequate basis for determining that the witnesses in question have personal knowledge of the events they report."). Nor do Plaintiffs allege any reason to believe CW6 would have knowledge about the "software problems," "slumping sales" or inadequate sales force headcount that CW6 "confirmed." ¶ 49. *See Applestein v. Medivation, Inc.*, No. C-10-0998, 2012 WL 986276, at *4-5 (N.D. Cal. Mar. 22, 2012) (rejecting allegations from a Senior Technology Engineer regarding pills used in clinical study); *In re Dot Hill Systems Corp. Sec. Litig.*, 594 F. Supp. 2d 1150, 1163 (S.D. Cal. 2008) (rejecting allegation from engineer CW that defendant company was "generally understaffed"; plaintiff "[did] not explain why an engineer would be in the position of knowing the staffing situation throughout the company.").

Beyond the foregoing, the allegations attributed to CW6 suffer from the same defect as those of Plaintiffs' other confidential witnesses – that is, as this Court previously observed, Plaintiffs allege no "specific facts" regarding how the "'problems' and 'difficulties'" purportedly identified by CW6 "necessarily precluded Juniper from reaching its projected growth targets."

Order at 21. Thus, while CW6 is alleged to have said Juniper's business was "adversely affected" by unspecified "software problems," "slumping sales" for unspecified "major routing and switching products," and a "lower than expected sales force headcount" (¶ 49), there are no quantifiable or concrete facts alleged, such as the financial impact of the purported problems, which "major products" were purportedly facing slumping sales and why the products were "major." *See, e.g.*, *Brodsky v. Yahoo! Inc.*, 592 F. Supp. 2d 1192, 1201-02 (N.D. Cal. 2008) (generalized CW allegations that Yahoo! revenues "began to decline" and that it was "not attaining its revenue forecasts" were insufficient to plead falsity).[5]

Similarly, although CW6 says that Juniper's adoption of the new FASB rules allowed it to recognize "$20 million in additional revenue in one quarter," and to meet its forecast in that unidentified quarter (¶ 50), CW6 does not claim this was not real revenue, or, for that matter, that the revenue impact from the accounting rule changes (which, as discussed above and below, Juniper conspicuously and repeatedly disclosed) was not specifically taken into account when Juniper made its long term projections. *See Foundry Networks,* 2003 WL 22077729, at *8, 10 (dismissing false forecasting claims; plaintiffs failed to allege facts demonstrating that the forecasts did not take into account the allegedly undisclosed facts).

Ultimately, it is not what CW6 is alleged to have said that is most telling, but what he is *not* alleged to have said. Plaintiffs allege CW6 had access to internal systems at Juniper that "tracked [the Company's] financial forecasts." ¶ 48. Yet, Plaintiffs never assert that the Company's financial forecasts, to which CW6 purportedly had access, showed – at any point in time – that Juniper would not reach its long term projections.

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[5] *See also In re Business Objects S.A. Sec. Litig.*, No. C04-2401, 2005 WL 1787860, at *5-7 (N.D. Cal. July 27, 2005) (allegations that "orders were being delayed and canceled" and that "some sales" were improperly recorded were insufficient; the court was "left to speculate as to the date, sales quantity, and other relevant details"); *Kuehbeck v. Genesis Microchip, Inc.*, No. C02-05344, 2005 WL 1787426, at *8 (N.D. Cal. July 27, 2005) (allegations of "declining orders from customers and lost sales" insufficient without details such as the financial impact of the allegedly lost sales); *In re Zumiez, Inc. Sec. Litig.*, No. C07-1980, 2009 WL 901934, at *11, 15 (W.D. Wash. Mar. 30, 2009) (dismissing complaint with prejudice where "even if Defendants had foreseen certain problems that could have negatively affected the late-year earnings, nothing suggests that they did not factor those considerations into their [earnings projections]").

The Court should dismiss Plaintiffs' challenge to Juniper's long term projections.

B. Plaintiffs Fail To Allege Any False Or Misleading Statement Regarding The New Accounting Rules

Plaintiffs also repeat their claim that Juniper should have disclosed additional details regarding the impact of the new accounting rules. ¶¶ 12-17, 51-60, 62-67, 81-85, 89-95, 105-09, 112, 116-19, 130-36, 179-204. This claim should again be dismissed.

1. Plaintiffs Fail to Allege That Juniper's Disclosures Violated FASB's Guidelines

The SAC adds no new facts regarding Juniper's disclosures or any purported duty to disclose. Thus, as before, Plaintiffs must "concede that Juniper made various disclosures throughout the Class Period regarding its adoption of the new accounting rules and the impact of the new rules on Juniper's financial results, and that Juniper's disclosure conformed to Example 1 in the FASB's disclosure guidelines." Order at 24.

Indeed, all that is new in the SAC are *arguments* as to why the Court was purportedly incorrect in holding that Plaintiffs "failed to plead facts showing that Defendants had an affirmative duty to provide further disclosures beyond what was already included in Juniper's SEC filings." *Id.* at 24-25. These new arguments about the purported inadequacies of Juniper's disclosures are without substance.

a. Mr. Harden's Declaration Should Not Be Considered

As an initial matter, the Court should decline to consider the Harden Declaration attached to Plaintiffs' complaint. The holding in *DeMarco v. DepoTech Corp.*, 149 F. Supp. 2d 1212 (S.D. Cal. 2001), a securities class action like the present case, is instructive. There, plaintiffs alleged that defendants misrepresented the efficacy and nontoxicity of an anticancer drug. They attached to their complaint the affidavit of a Yale University School of Medicine professor who provided expert testimony regarding the interpretation and evaluation of data generated by new drug clinical trials, as well as his opinion as to the materiality of the alleged misrepresentations. The Court granted the defendants' motion to strike the expert's affidavit. The Court stated:

> The Court further questions whether any good reason exists for a plaintiff to attach an expert affidavit as an exhibit to a complaint. The inclusion of such an affidavit

> in no way relieves a plaintiff of its burden to comply with the Reform Act and the applicable provisions of the Federal Rules of Civil Procedure. Because the Court must generally assume the truth of all material factual allegations in a complaint, averments in an expert affidavit carry no additional probative weight merely because they appear within an affidavit rather than numbered paragraphs of the complaint. A securities fraud complaint must, regardless of its form and attachments, provide the factual specificity required by the Reform Act and Rule 9(b). Conclusory allegations and speculation carry no additional weight merely because a plaintiff placed them within the affidavit of a retained expert.

Id. at 1221-22; *see also Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 286 (5th Cir. 2006) (holding that district court properly refused to consider opinions in expert's affidavit attached to complaint; "PSLRA complaints must allege specific facts … opinions cannot substitute for facts under the PSLRA.").[6] The same logic applies here. The SAC must stand or fall based on what Plaintiffs have alleged, not upon any purported expert opinion.

b. Plaintiffs and Mr. Harden Fail to Explain Why Any Additional Disclosures Were Needed to Satisfy FASB

Even if considered, Mr. Harden's opinions do not save Plaintiffs' defective claim. Although Plaintiffs have dutifully copied into the SAC each of Mr. Harden's three arguments as to why, despite this Court's prior decision to the contrary, Juniper's disclosures were purportedly inadequate, none of those arguments has merit. *See* ¶¶ 15-17, 65-67, 81-83, 92-94, 106-08, 116-18, 132-34, 191(a)-(c); Harden ¶ 18.

Plaintiffs first allege, based upon Mr. Harden's declaration, that Juniper should have disclosed "[t]he magnitude of deferred revenue recognized in 2010 under previous accounting rules" and "the periods over which such deferred revenue [was] expected to be recognized." ¶ 191(b); Harden ¶ 18.b. Plaintiffs claim that this information was necessary because investors needed to understand that Juniper continued to recognize revenues from its deferred revenue balances, while also recognizing more revenue up front from new sales under the new rules –

[6] *See also Stuart v. Cadbury Adams USA, LLC*, No. CV 09-6295, 2010 WL 1407303, at *4 (C.D. Cal. Apr. 5, 2010) (holding that expert report generated for purposes of litigation and attached to complaint is not properly considered part of complaint), *aff'd*, 458 F. App'x 689 (9th Cir. 2011); *Benzon v. Morgan Stanley Distrib., Inc.*, No. 3:03-0159, 2004 WL 62747, at *3 (M.D. Tenn. Jan. 8, 2004) (refusing to consider expert opinions and analysis appended to complaint), *aff'd*, 430 F.3d 598 (6th Cir. 2005).

what Plaintiffs and Mr. Harden call the "bump." ¶¶ 15, 191(b); Harden ¶ 18.b. Juniper *did* disclose this information.

In its FY 2009 10-K, filed on February 26, 2010, Juniper reported the amount of deferred revenue it had on its balance sheet as of the end of 2009, *i.e.*, the amount of deferred revenue on its books before the adoption of the new rules in January 2010. Ex. 1 at 87. As Plaintiffs themselves concede, Juniper also broke its deferred revenue balance into two categories: "short term" or "current" deferred, meaning deferred revenue that was expected to be recognized in the next twelve months, and "long term" deferred, meaning deferred revenue that was expected to be recognized later than the next twelve months (after 2010). ¶ 193; Harden ¶ 20. Thus, simply by looking at Juniper's FY 2009 10-K, investors could see the magnitude of deferred revenue Juniper expected to recognize in FY 2010 under the old accounting rules, and how much deferred revenue was expected to be recognized in FY 2011 or later. *Id.* In other words, Juniper disclosed precisely what Plaintiffs claim to be missing – "the magnitude of deferred revenue recognized in 2010 under previous accounting rules" and "the periods over which such deferred revenue [was] expected to be recognized." ¶ 191(b).

Although Juniper made this disclosure, the disclosure was *not* "necessary," as Plaintiffs and Mr. Harden contend, to allow investors to understand that Juniper (a) continued to recognize revenue from its deferred revenue balances generated under the old rules, and (b) generally recognized more revenue up front under the new rules – two facts which, taken together, Plaintiffs and Mr. Harden call the "bump." ¶¶ 191(b); Harden ¶ 18.b. Juniper separately told investors both of these things. Each quarter in 2010, Juniper told investors that the new rules allowed Juniper to recognize revenue that would otherwise have been deferred under the old rules. Ex. 3 at 6; Ex. 4 at 6-7; Ex. 5 at 6; Ex. 6 at 32-33. Each quarter, Juniper also told investors that it was recognizing previously deferred revenue from the balance sheet, and explained the specific criteria it followed to determine when that revenue could be recognized. Ex. 3 at 6-8; Ex. 4 at 6-8; Ex. 5 at 6-8; Ex. 6 at 32-33. Both propositions were also explained on conference calls. Thus, on Juniper's Q1 2010 conference call, Ms. Denholm explained that the new rules generally allowed Juniper to recognize more revenue up front. *See* Ex. 9 at 8 ("[F]rom

the first of January onwards [] the new rules apply; and what that means in terms of the future feature commitment area is that you still defer an amount of revenue, but the amount is commensurate with the value of those features *as opposed to deferring the whole of the revenue amount.*") (emphasis added). Ms. Denholm also explained that Juniper continued to recognize deferred revenues from the balance sheet under the old rules:

> Even with the adoption of the new revenue recognition rules, we continue to defer product revenue for arrangements entered into prior to the beginning of the year, and we will recognize those revenues under the old rules.

Id. at 6. Finally, Ms. Denholm explained that revenue "that has been on the balance sheet under the old rules" was expected to be recognized "over the next four to six quarters." Ex. 10 at 18. In other words, Juniper told investors in unmistakable language that it was continuing to recognize deferred revenue from transactions under the old rules, while also recognizing more revenue up front under the new rules.

Plaintiffs' and Mr. Harden's second theory is that Juniper's disclosures were inadequate because Juniper did not disclose "[a] breakdown of deferred revenue under the old and new accounting rules" (*i.e.*, Example 3) so that investors could "understand [the] changes in the pattern of revenue recognition as a result of the adoption of the new rules." ¶ 191(c); Harden ¶ 18.c. At the outset, Plaintiffs do not explain what they mean by a "breakdown of deferred revenue." ¶ 66. Juniper provided many details and breakdowns regarding its deferred revenues and deferred revenue balances. *See supra* at 7-8. Plaintiffs also do not explain, as they must to state a claim for securities fraud, why any supposed inability to understand "the changes in the pattern of revenue recognition" rendered Juniper's financial statements misleading. Order at 27 (holding that it is not enough to allege that a disclosure was not "complete"; it must also be false or misleading). While Plaintiffs assert that more disclosure was required "because the new accounting rules generally result in less deferred revenue" than the old rules (¶¶ 66, 191(c)), Juniper disclosed, repeatedly, that it expected deferred revenue balances to decline over time under the new rules. *Supra* at 6; ¶¶ 84, 109, 135; Order at 9.[7] Juniper also told investors its

[7] Ultimately, Juniper's deferred revenues did not decline as Juniper expected (*compare* Ex. 1 at 87 *with* Ex. 6 at 49 *with* Ex. 4 at 21), thus confirming what Juniper also said in that disclosure, (continued...)

deferred revenue balances each quarter. Ex. 3 at 17; Ex. 4 at 21, 59; Ex. 5 at 20, 57; Ex. 6 at 49, 80. Thus, investors could see for themselves whether Juniper's deferred revenue balances were declining after the new accounting rules were adopted, and if so, by how much. Nothing more was required.

Finally, Plaintiffs allege, based upon Mr. Harden's declaration, that Juniper should have disclosed the impact of the rule change on operating margins, net income, and earnings per share. ¶¶ 67, 191(a); Harden ¶ 18.a. Notably, this information is not even found among the proposed disclosures in FASB's Example 1, 2 or 3. It is merely additional detail that Plaintiffs and Mr. Harden plucked from thin air, and claim was "necessary" for investors "to understand" the impact of the new rules. Apart from the fact that Plaintiffs offer no explanation *why* this information was "necessary," much less why the absence of this information rendered Juniper's financial statements misleading, Plaintiffs themselves purport to calculate this very information – *i.e.*, the new rules' impact on operating margins, net income and earnings per share in each quarter of 2010 – based upon information in Juniper's public disclosures. ¶¶ 62, 89, 112-13. Plaintiffs have thus conceded that Juniper disclosed the very information that would allow investors to calculate those metrics themselves. *In re Netflix, Inc. Sec. Litig.*, No. C 04-2978, 2005 WL 3096209, at *9 (N.D. Cal. Nov. 18, 2005) (dismissing 10b-5 claim based on failure to disclose "churn rates" where the "raw data that would have allowed investors and analysts to calculate" those rates were disclosed); *Werner v. Werner*, 267 F.3d 288, 299 (3d Cir. 2001) (affirming dismissal of 10b-5 claim where "the shareholders had access to all of the information necessary to calculate the exact amount of the benefit management incurred[.]"); *Field v. Trump,*

(...continued from previous page)
i.e., that while it expected deferred revenues to decline, it could not reasonably estimate the effect of the new rules on future financial periods. *See* Order at 9. Despite the fact that Juniper's deferred revenues did not decline as expected, Plaintiffs assert, without support, that Juniper "simply chose not to" estimate the impact of the new rules on future periods. ¶ 85. Plaintiffs do not allege any facts to support this conclusory allegation, just as they do not explain how Juniper could supposedly make an estimate that would involve projecting (1) how many multiple-element arrangements would be sold in future periods that would include undelivered elements; and (2) the value that would be assigned to the delivered versus undelivered elements (which would dictate the amount of revenue that must be deferred under the new rules).

850 F.2d 938, 949 (2d Cir. 1988) (failure to perform calculation for investors is not actionable disclosure).[8]

In sum, Plaintiffs' new arguments as to why Juniper's disclosures were purportedly inadequate fail to allege any violation of the federal securities laws.

As the Supreme Court and the Ninth Circuit have recognized:

> 'generally accepted accounting principles' are far from being a canonical set of rules . . . [they] tolerate a range of reasonable treatments,' [and] we generally defer to the professional judgment of the accountant who audited or prepared the financial statements, unless a GAAP authority *demands* a contrary accounting treatment.

Bolt v. Merrimack Pharms., Inc., 503 F.3d 913, 918 (9th Cir. 2007), quoting *Thor Power Tool Co. v. Comm'r*, 439 U.S. 522, 544 (1979). Analogously, FASB could have, but *did not*, demand a uniform set of metrics for all companies to report. Order at 7; Ex. 14 at 3. Rather, FASB allowed companies to use their own judgment, implicitly recognizing that reasonable minds can differ regarding the quantitative disclosures that were sufficient to fulfill the disclosure objective. Here, Juniper disclosed the metrics suggested in Example 1 *plus* various additional details. *Supra* at 7-8. Plaintiffs' assertion that Juniper should have disclosed more, or packaged the information differently, cannot support a securities fraud claim. Order at 23-24; *Brody*, 280 F.3d at 1006 (holding federal securities laws prohibit only false or misleading statements, not statements that are incomplete); *Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.,* No. 10-CV-03451, 2011 WL 3501733, at *11 (N.D. Cal. Aug. 10, 2011) (same); *Netflix*, 2005 WL

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[8] Plaintiffs again press their allegations that, although Juniper reported the dollar impact of the new accounting rules in its quarterly financial statements in its Forms 10-Q, Juniper should have repeated that same information in its press releases and conference calls. *See* ¶¶ 58, 62-64, However, this theory, that the disclosures were "buried" and needed to be repeated in press releases and conference calls was rejected by this Court because repetition would not significantly alter the total mix of information available in the market. *See* Order at 23-24; *See also Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981-82 (9th Cir. 1999) (rejecting claim that FHI, a holding company of Ford Motors, was required to disclose, again, that Ford Motors could cash out FHI shareholders because the prospectuses for the initial offerings of FHI disclosed that shareholders could be cashed out at any time); *Netflix*, 2005 WL 3096209, at *8 (rejecting claim that failure to repeatedly disclose company's formula for calculating churn rate was misleading where company had disclosed formula in a press release and quarterly reports more than five months earlier).

3096209, at *9 (rejecting claim that disclosures violated federal securities laws because they could have been presented more clearly).[9]

III. PLAINTIFFS FAIL TO ALLEGE A "STRONG INFERENCE" OF SCIENTER

Because Plaintiffs have failed to allege any false or misleading statement, it necessarily follows that Plaintiffs have not adequately plead facts from which one can infer that the defendants actually knew their statements to be false or misleading. *See* Order at 27. Regardless, the SAC fails to allege facts creating a "strong inference" that the defendants acted with scienter or fraudulent intent.

To create a strong inference of scienter, a plaintiff must allege facts demonstrating that the defendant "'made false or misleading statements either intentionally or with deliberate recklessness.'" Order at 25, quoting *In re Daou Sys., Inc. Sec. Litig.*, 411 F.3d 1006, 1022 (9th Cir. 2005). As this Court instructed Plaintiffs, "deliberate recklessness" must "'reflect some degree of intentional or conscious misconduct.'" Order at 25, 26 (citations omitted). For forward-looking statements, the standard is even higher – Plaintiffs must plead facts creating a strong inference that the defendants made the forecasts with "actual knowledge" that they were false when made. *Id.* An inference of scienter, moreover, must be "more than merely 'reasonable' or 'permissible' – it must be cogent and compelling, thus strong in light of other explanations.'" *Id.* at 26 (citing *Tellabs*, 551 U.S. at 324). A complaint will survive "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Id*.

The Court previously found that Plaintiffs failed to allege facts giving rise to a strong inference of scienter. Order at 26-30. In reaching that conclusion, the Court considered and

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[9] Plaintiffs separately assert that, under SEC regulations, financial statements that are not prepared in compliance with GAAP are presumed to be misleading. ¶ 180 (citing Regulation S-X (17 C.F.R. § 210.4-01(a)(1)). This is a *non-sequitur*. Plaintiffs nowhere allege that Juniper improperly recognized revenue under either the old or new accounting rules, and nowhere allege that Juniper's financial statements did not comply with GAAP. Rather, Plaintiffs' argument is that Juniper should have made additional disclosures that were, by Plaintiffs' own admission, *not* mandated by FASB. *See* ¶ 186 (conceding FASB "does not prescribe what quantitative disclosures would be necessary" but instead gives three examples); ¶ 192 (conceding that the additional disclosures Plaintiffs list merely "might" be required "in certain circumstances").

rejected Plaintiffs' allegations regarding the Individual Defendants' corporate roles and alleged knowledge of Juniper's inner workings (*id.* at 26-27), as well as Plaintiffs' "motive and opportunity" allegations (*id.* at 28-29). The SAC adds no new facts whatsoever regarding the Individual Defendants' states of mind, nor any new facts regarding the Individual Defendants' supposed motive and opportunity to commit fraud. *Compare* AC ¶¶ 31-43 *with* ¶¶ 35-50; AC ¶¶ 165-68 *with* ¶¶ 217-20; and AC ¶¶ 177-86 *with* ¶¶ 206-16. Since literally the only new factual allegations (aside from a sentence regarding stock sales discussed below) are those attributed to CW6, the Court need look no further than CW6 to see if the SAC has cured Plaintiffs' earlier failure to plead scienter.

A. CW6 Does Not Allege Facts Giving Rise To a Strong Inference of Scienter

At the outset, CW6 does not say anything regarding the adequacy of Juniper's disclosures surrounding the new accounting rules. Thus, the allegations attributed to CW6 cannot support a claim that any defendant was deliberately reckless with respect to those disclosures. Additionally, since the allegations attributed to CW6 are insufficient to allege Juniper's long term projections were false when made (*supra* at 13-14), those allegations cannot give rise to a strong inference of scienter. *In re Vantive Corp. Sec. Litig.*, 283 F.3d 1079, 1091-92 (9th Cir. 2002) (where "the alleged problems upon which [a false forecasting claim] relies have themselves not been pleaded successfully," there is no basis upon which to say that "the defendants knew that their forecasts could not possibly be accurate."), *abrogation recognized by South Ferry LP, No. 2 v. Killinger*, 542 F.3d 776 (9th Cir. 2008).

Regardless, CW6 does not claim to know what any Individual Defendant knew or when he or she knew it. *See* ¶¶ 48-50. In fact, CW6 does not claim he even had contact with or spoke to any Individual Defendant. Rather, essentially all that Plaintiffs have alleged is CW6's unsubstantiated opinion that the long term revenue projections were "not [] realistic." ¶ 48. This is manifestly not enough to plead the requisite strong inference. *See, e.g., Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.*, No. 10-CV-03451, 2012 WL 1868874, at *20 (N.D. Cal. May 22, 2012) (finding where confidential witnesses did not "actually communicate[] with any of the Individual Defendants" they "offer little, if any, reliable basis from which to infer scienter."); *In*

re Metawave Commcn's Corp. Sec. Litig., 298 F. Supp. 2d 1056, 1073 (W.D. Wash. 2003) (holding CW allegations did not support scienter because "CW7's belief that [company] executives lied to hide the truth from investors and the public is merely his opinion"); *In re Accuray S'holder Deriv. Litig.*, 757 F. Supp. 2d 919, 932 (N.D. Cal. 2010) (finding CW allegations "do not add anything meaningful to the complaint" where CWs did not have contact with defendants and had "no knowledge of what either Defendant knew at the time each of the challenged statements was made."); *In re Rackable Sys., Inc. Sec. Litig.,* No. C09-0222, 2010 WL 199703, at *8 (N.D. Cal. Jan. 13, 2010) (finding plaintiff failed to allege scienter where no CW "heard or read any statement by any defendant, that contradicted or even cast doubt on a public statement made during the class period.") (citation omitted); *Zucco*, 552 F.3d at 995, 998 (holding witness statements that do not reflect "reliable personal knowledge of the defendant's mental state" fail to support an inference of scienter).

B. Plaintiffs' Motive and Opportunity Allegations Do Not Give Rise To a Strong Inference of Scienter

Plaintiffs' remaining allegations are the same motive and opportunity allegations that the Court already found inadequate. Order at 28-30; *Compare* AC ¶¶ 177-86 *with* ¶¶ 206-16 and AC ¶¶ 165-68 *with* ¶¶ 217-20. As the Court explicitly told Plaintiffs in dismissing the AC, "Ninth Circuit case law makes clear that such 'motive and opportunity evidence alone is insufficient to establish scienter at the pleadings stage.'" Order at 29 (citing *Lipton v. PathoGenesis Corp.*, 284 F.3d 1027, 1035 (9th Cir. 2002)); *see also Metzler*, 540 F.3d at 1066-67. Thus, Plaintiffs' recycled motive and opportunity allegations need not be considered.

Plaintiffs' only new allegation regarding scienter is a single sentence to the effect that "open market insider sales" increased in the first quarter of 2011 as compared to 2010 and 2009. ¶ 20. Plaintiffs do not identify which "insiders" are referenced here. To the extent Plaintiffs are referring to sales by non-defendants, those sales are irrelevant. *See, e.g.*, *Wozniak v. Align Tech., Inc.*, No. C-09-3671, 2011 WL 2269418, at *14 (N.D. Cal. Jun. 8, 2011) (rejecting that alleged "suspicious" sales of other company insiders supported scienter because "[s]ales by insiders not named as defendants . . . are irrelevant to the determination of the named defendant's scienter");

In re Splash Tech. Holdings, Inc. Sec. Litig., 160 F. Supp. 2d 1059, 1082 n.22 (N.D. Cal. 2001) (finding "no reason to consider" named non-defendants' stock sales in considering defendants' scienter where plaintiffs did not allege specific facts indicating that insiders possessed non-public adverse information). To the extent Plaintiffs are saying that the Individual Defendants' stock sales increased in Q1 2011, the Court already found that "the Individual Defendants' stock sales from 2009-2011 [including the sales by Mr. Kriens] do not support a strong inference of scienter." Order at 28.

IV. PLAINTIFFS' SECTION 20(a) AND SECTION 20A CLAIMS FAIL

Plaintiffs' claims under Section 20(a) and Section 20A fail because the SAC does not adequately allege a primary violation under Section 10(b). Order at 30.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiffs' Second Amended Complaint. Because Plaintiffs have already had a chance to amend and have demonstrated that they are unable to allege any additional facts that could save their claims, this action should be dismissed with prejudice.

Dated: September 17, 2012

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By /s/ Nina F. Locker
Nina F. Locker

Attorneys for Defendants

ECF CERTIFICATION

I, Joni Ostler, am the ECF user whose identification and password are being used to file the Defendants' Notice of Motion and Motion to Dismiss Second Amended Complaint for Violation of the Federal Securities Laws. In compliance with General Order 45.X.B, I hereby attest that Nina F. Locker has concurred in this filing.

Dated: September 17, 2012

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: /s/ Joni Ostler
Joni Ostler